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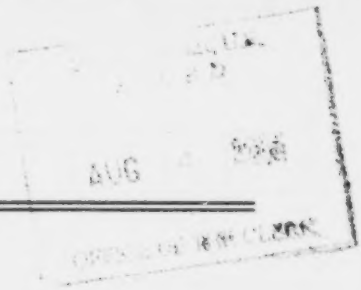

In The

Supreme Court of the United States

NICK S. BOSCARINO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY FOR THE PETITIONER NICK S. BOSCARINO

MARC W. MARTIN
Counsel of Record
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 408-1111

Attorney for Petitioner Nick S. Boscarino

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY TO STATEMENT OF THE CASE

1. The government's Brief in Opposition states that during the period ABI/Acordia provided insurance brokerage services to Rosemont, "ABI/Acordia overcharged Rosemont for its services and kicked back part of the excess to petitioner." Govt's BIO, p. 2.

Petitioner, who was not an ABI/Acordia employee, however, lacked knowledge of its billing practices. Tr. 314. It was undisputed that the petitioner was unaware that ABI/Acordia had overcharged Rosemont. Tr. 294. In fact, the government's principal witness at trial, Ralph Aulenta, testified that the petitioner would have permitted cheating of Rosemont. Tr. 259-61.

2. The government's Brief in Opposition declares that, for each of the years in question, Aulenta caused ABI/Acordia to issue a check to one of the petitioner's corporations. Govt's BIO, p. 2. The Brief in Opposition further states that the petitioner did not deposit the funds into a corporate account, but rather endorsed the checks to Aulenta who returned half to the petitioner in monthly increments. *Id.*

These statements are inaccurate on a number of fronts. In 1994, ABI/Acordia issued the referral fee check to Aulenta. Tr. 182-83, 811. In 1991-1993 and 1995-1996, the checks were issued to one of the petitioner's corporations. Tr. 121-22, 142, 161-62, 170, 189, 194-96, 282, 316, 360-68, 403-09, 432, 745-46. In 1995 and 1996, the checks were deposited into the petitioner's corporate accounts. Tr. 541, 546, 995, 1445-46, 1450-51. Aulenta testified that he incrementally returned cash to the petitioner only in 1991 and 1992. Tr. 130-31, 164-69. Between 1993 and 1996, the funds were deposited into a joint trading account at

Charles Schwab. Tr. 173-74, 184, 192, 199, 543-46, 766-795, 773. Petitioner's demographic information was disclosed in that account. Tr. 287, 794.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR CIRCUIT SPLIT ON THE QUESTION OF WHETHER COURTS SHOULD PRESUME THAT A SENTENCE WITHIN THE RANGE ESTABLISHED BY THE UNITED STATES SENTENCING GUIDELINES IS REASONABLE

a. Petitioner will reply to the second issue in his *certiorari* petition first. The government's Brief in Opposition effectively discloses the split among the circuit courts of appeal on the question of whether a sentence within the range established by the United States Sentencing Guidelines should be presumed reasonable. Govt's BIO, pp. 10-11.

This is not a circuit split in which a lone court of appeals has taken a view contrary to other circuits. Rather, as described in the Brief in Opposition, six circuits has held in favor of the presumption, while four circuits have not. In fact, as discussed below, *all* the circuits have issued opinions discussing the issue.

The government opposes the petitioner's request for *certiorari* on two grounds. First, the government questions the materiality of the difference among the standards announced by the circuits. Second, the government says that it is too early for this Honorable Court to address the split.

With respect to the materiality question, the government cannot dispute that presumptions are a significant legal tool. A presumption may often be outcome-determinative. In a close case or one of equipoise, a presumption will make a material difference. *Cf. Smith v. Doe*, 538 U.S. 84, 110 (2003) (Souter, J., concurring).

Moreover, the government fails to cite any pronouncement from this Honorable Court to the effect that the sentencing guidelines should be given more weight than other factors listed in 18 U.S.C. § 3553(a). Nor does the government point to a statute that provides authority for the presumption created in *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005), and followed in other cases.

The government's timing argument pays short shrift to the nature of the underlying proceeding – federal criminal sentencing. Sentencing hearings occur on a daily basis in the district courts. For example, the United States Sentencing Commission's *2005 Annual Report* noted that the Commission had received data on 72,462 sentences handed down between October 1, 2004 and September 30, 2005. Sentencings in 53,674 of these cases occurred after *United States v. Booker*, 543 U.S. 220 (2005).

The frequency with which sentencings occur underscores the importance of the question presented. The question presented not only affects the standard of review employed by courts of appeal, but it also affects sentencing methodology at the district court level. It is one thing for district courts, in fashioning sentences, to treat the guidelines as one of several equal factors. It is quite another for district courts to consider the sentencing guidelines as presumptive, as here.

The Ninth Circuit recently captured this point in *United States v. Zavala*, 443 F.2d 1165, 1170 (9th Cir. 2006) (*per curiam*):

> While an appellate court will review the sentencing result to see if it comes within the extended territory of reasonableness, and will merely conduct a periplus of the borders of that territory, the district court has a very different charge. It is sentencing an individual, and its task is to attempt to find the most reasonable sentence for that person within the territory of all possible reasonable sentences. That difference in charge is central; it is not simply semantical. The difference in approach can be captured in the difference between starting points and presumptions. The former bespeak a mind open to all of the nuances and possibilities of the human condition that district judges are so good at perceiving. The latter bespeaks a mind which is rather closed unless it can be pried open by something truly extraordinary. It harkens back to Guideline "departures," which were expected to be quite extraordinary. *See* USSG § 1A1.1 ed. n. 4(b). To put it another way, even though it is very likely that the Guideline calculation will yield a site within the borders of reasonable sentencing territory, that still does not mean either that there are no other sites within those borders, or that one of them will not prove to be the most reasonable sentence for the particular individual, or that the district court should resist being led to another site, or that the district court should not strive to reach the best site.

Nor is this an instance in which more time is needed for the circuits to weigh in on the issue. The two circuits not cited in the Brief in Opposition have discussed the

issue. In *United States v. Dorcely,* 2006 WL 2034245 (D.C.Cir. July 21, 2006), the D.C. Circuit recently held that a properly-calculated sentence within the guidelines range is entitled to a rebuttable presumption of reasonableness. In *Zavala*, the Ninth Circuit – which has spoken in terms of using the guidelines as a "starting point" – purported not to formally opine on the presumption issue, but found that a district court that "makes the Guideline calculation *the* presumptive sentence . . . commit[s] legal error by misapplying § 3553(a)." 443 F.2d at 1170.

At this juncture, every circuit has discussed the issue raised in the *certiorari* petition. Additional time to receive the benefit of additional judicial thinking is unnecessary. The issue is important, as it plays a role in every sentencing that occurs in the federal courts. Uniformity in the law is something to be strived for, especially with respect to sentencing. At this point, that ideal is not being achieved.

b. In his *certiorari* petition, the petitioner contested the disparity between his sentence and the one imposed on his co-defendant, Aulenta. Disparity in sentencing is a factor set forth in 18 U.S.C. § 3553(a)(6).

Citing *United States v. Smith*, 445 F.3d 1, 5 (1st Cir. 2006), the government asserts that any disparity comparison must be made on the basis of sentences imposed on classes of similarly-situated offenders nationwide, as opposed to a co-defendant's sentence. Nothing in § 3553(a)(6), however, limits disparity comparisons to nationwide comparisons. The gloss proposed by the government is also inconsistent with 18 U.S.C. § 3661 which places no limitation on the consideration of information in connection with sentencing, *cf. United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*), to say nothing of the practical difficulty of

performing a *timely* nationwide disparity comparison at a sentencing hearing.

II. "HONEST SERVICES" FRAUD IS NOT A MONEY LAUNDERING PREDICATE ACT

The government concedes that the statute making it a federal crime to deprive another of "the intangible right to honest services," 18 U.S.C. § 1346, is not denoted as a predicate act in the money laundering statutes. Govt's BIO, p. 6. Like the court of appeals, the government asserts that this does not matter because § 1346 is a "definitional" statute. The government, however, does not argue, nor could it, that 18 U.S.C. §§ 1341 and 1343, standing alone, criminalize a scheme to defraud another of "the intangible right to honest services." Furthermore, no case from this Honorable Court has held that a statute that Congress has failed to include in a listing of predicate acts may nonetheless qualify as a predicate act.

The government resists the petitioner's argument that an "honest services" fraud scheme does not itself produce a tangible, recognized property interest capable of being laundered in a monetary transaction (necessary for a money laundering offense). The government's position does not account for this Court's pronouncements that the mail and wire fraud statutes (§§ 1341 and 1343) require that the "object of the fraud . . . be [money or] property in the victim's hands." *Pasquantino v. United States*, 544 U.S. 349, 355 (2005) (quoting *Cleveland v. United States*, 531 U.S. 12, 26 (2000)). The "object of the fraud" in a scheme to deprive another of the right to "honest services" is intangible, and cannot be laundered in a financial transaction. *Cf. McNally v. United States*, 483 U.S. 350 (1987).

III. RESTITUTION SHOULD NOT BE ORDERED WHEN THE "VICTIM" PARTICIPATED IN THE OFFENSE AND NEVER HAD ANY LEGAL ENTITLEMENT TO THE FUNDS FOR WHICH RESTITUTION WAS ORDERED

The government concedes that ABI/Acordia "overcharged Rosemont for its services." Govt's BIO, p. 2. As a participant in the fraud on Rosemont, ABI/Acordia simply cannot be considered a "victim" within the meaning of the Mandatory Victims Restitution Act of 1996 ("MVRA"). 18 U.S.C. § 3663A(a)(2). Because ABI/Acordia had no legal entitlement to the overcharged funds in the first place, it did not suffer a "pecuniary loss" within the meaning of MVRA. The holding endorsed by the government condones, and even rewards, criminal behavior.

CONCLUSION

WHEREFORE, Petitioner Nick S. Boscarino respectfully prays that this Honorable Court grant his petition for *certiorari*, issue a writ of *certiorari* to vacate or review the judgment of the Seventh Circuit, remand for further consideration, hold the petition and remand for further consideration in light of *Cunningham v. California*, *cert. granted*, No. 05-6551 or any other case touching upon the issues presented in the *certiorari* petition and/or grant any other appropriate relief.

Respectfully submitted,

MARC W. MARTIN
Counsel of Record
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 408-1111

Attorney for Petitioner Nick S. Boscarino